(3)

No. 90-270

In The

Supreme Court of the United States

October Term, 1990

SUSAN BRANDT; BOYD DOVER; LUCINDA BLAIR; ANDY HARCLERODE; SHERRY MEREDITY; LLOYD NOVICK; DOUGLAS X. PATINO AND DARWIN COX,

Petitioners,

v.

CHALKBOARD, INC.; KAREN M. HOYT,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATEMENT OF THE CASE

Several facts pertinent to the issues in this case and omitted from the Petition are set forth herein. Upon the arrival at the Chalkboard Preschool on October 10, 1985, all of the investigators were advised that the man accused of sexual abuse had been suspended from the Center and would be excluded from the facility during the investigation. The young man accused of these offenses was married with children and had worked at the Center for two years. He had no criminal record and denied the allegations in this case. He also offered to take a polygraph examination. The truth of these allegations was highly doubtful. Petitioner Boyd Dover may not have known that the man accused of sexual misconduct had been excluded from the Center at the time he signed the closure order.

Physical abuse was not approved of or authorized as a form of discipline at the day-care center. In fact, the director and assistant director of Chalkboard had instructed the staff that the only appropriate discipline was a brief period of "time out" for not more than five (5) minutes. The investigators were advised the alleged physical abuse had been reported to the owners of the Chalkboard and that immediately thereafter all such incidents had ceased. The evidence demonstrated that any alleged physical abuse ended approximately two months prior to the investigation.

On October 11th, agents of the Department of Health Services began drafting the Summary Suspension Order. The final Order was served on October 16, 1985. No one ever advised Karen Hoyt or anyone from the Chalkboard

about the allegations of physical abuse until she received notice in the Summary Suspension Order.

As to the allegation of overcrowding, the Governor's Task Force on day-care centers had indicated that there was a need for many more day-care centers in Arizona. This problem had existed at the Chalkboard even before Karen Hoyt acquired the school in 1983. Officials of Child Protective Services and Department of Health Services were aware of the excess children and knew that it did not pose a serious threat or necessitate an emergency closure of the school.

Overcrowding occurred when parents who worked a day shift could not pick up their children until after 5:00 p.m. but parents who worked an afternoon shift needed to drop off their children between 3:30 p.m. and 5:00 p.m. Excess children were only present from approximately 3:30 p.m. until 5:30 p.m. Karen Hoyt was trying to acquire additional space to resolve the situation. In addition, no excess children were allowed at the school at any time after October 11, 1985. Two days before the Summary Suspension Order was issued, Department of Health Services investigators made an inspection and found no excess children at the center.

According to uncontroverted testimony by both Karen Hoyt and an expert in the field of day-care, once the allegations of sexual abuse at the day-care center and the closure of the day-care center occurred, Respondent's livelihood was destroyed. Once these allegations were publicized, the Center closed and the children removed

from the facility, no subsequent action could have resurrected Respondents' business.

SUMMARY OF THE ARGUMENTS PRESENTED

1. The Ninth Circuit's opinion is entirely consistent with *Davis v. Scherer*. The opinion below holds that even if there is a violation of Arizona state law, Petitioners would nonetheless be entitled to summarily close Respondent's business if an emergency existed. This holding is entirely consistent with this Court's opinion in *Davis v. Scherer*, holding that the violation of a state's statute does not preclude an official from a grant of qualified immunity.

2. The Ninth Circuit correctly applied the *Mathews v. Eldridge* test in concluding that based on the significant private interest at stake, the high risk of an erroneous deprivation, and the burdens that additional procedures would entail for the state, due process would require some sort of pre-deprivation hearing absent an emergency. This opinion is consistent with opinions of this and other Courts.

3. There is no conflict between the Ninth Circuit's opinion and the decision of the Tenth Circuit or the Nebraska Supreme Court. The Nebraska Supreme Court held simply that in an emergency situation, the summary closure of a day-care center would be permissible. The Tenth Circuit opinion was actually an opinion by the District Court of New Mexico that held that there was no protected property interest under New Mexico law in a

day-care center's license. The ruling was affirmed without an opinion by the Tenth Circuit. Both cases are entirely consistent with the opinion below.

4. Petitioners' argument that an administrator's subjective belief that there is an emergency should never be challenged as to its objective reasonableness is contrary to this Court's opinion in *Harlow v. Fitzsimmons* and its progeny.

5. The law establishing that absent an emergency, some sort of pre-deprivation hearing is required before an individual's livelihood is destroyed is well established in the law. Respondent's license was her livelihood and also provided a livelihood for all of the employees of the day-care center.

REASONS FOR DISALLOWANCE OF THE WRIT

I. THE OPINION OF THE COURT OF APPEALS IN NO WAY CONFLICTS WITH THIS COURT'S HOLDING IN *DAVIS V. SCHERER* AS IT DOES NOT PRECLUDE PETITIONERS FROM TAKING ADVANTAGE OF QUALIFIED IMMUNITY DESPITE THEIR VIOLATION OF AN ARIZONA STATUTE

A. The Ninth Circuit opinion holds that despite a violation of Arizona state law, Petitioners may be entitled to qualified immunity and the opinion does not conflict with *Davis v. Scherer.*

In *Davis v. Scherer,* 468 U.S. 183 (1984), this Court held that the fact that a government official violates a state statute or regulation does not preclude that official from raising a claim of qualified immunity. The opinion below

does nothing to disturb this ruling. The Ninth Circuit did not preclude Petitioners from raising the defense of qualified immunity. Despite the violation of an Arizona statute, the Ninth Circuit held that the Petitioners would be entitled to qualified immunity if an emergency necessitated postponement of the hearing. *Chalkboard v. Brandt*, 902 F.2d 1375, 81 & n.6 (1990). The opinion below held only that the Petitioners were not entitled to qualified immunity as a matter of law and upheld the District Court's denial of Petitioner's motion for summary judgment. In short, contrary to the Petitioners' assertions, the Ninth Circuit recognized that the Petitioners would in fact be entitled to qualified immunity if an emergency existed precluding a pre-deprivation hearing.

The Arizona statutory scheme was considered by the Ninth Circuit for a very limited purpose.[1] In determining what process is due, *Mathews v. Eldridge*, 424 U.S. 319 (1976) requires that three factors be considered, the private interest affected, the risk of erroneous deprivation through the procedures used and the value of additional procedures, and the government's interest including the burden that additional procedures would entail.

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[1] Arizona Revised Statute § 36-886.01 states "When the department has reason to believe that a day-care center is operating under conditions that present *possibilities of serious harm to children*, the department shall notify the county attorney or the attorney general, who *shall* immediately seek a restraining order and injunction against the day care center." (Emphasis added). Although this issue has not been raised, the Arizona case law, legislative history, and readings of the statutes make clear that the legislature did not intend the Petitioners to have the ability to summarily close an institution.

As to the final prong of *Mathews*, the Court of Appeals looked to the statutory scheme spelled out by the Arizona legislature to evaluate the "burdens that the additional or substitute procedural requirement would entail". *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The Court of Appeals concluded that because the legislature had provided a swift procedural means of obtaining a closure of a day-care facility, the State had considered the burdens involved in these procedures and the procedures had been accepted as not too burdensome.

Petitioners' first argument for granting the Petition for Writ of Certiorari is that the Court of Appeals violated the holding of *Davis v. Scherer*, supra. The opinion below did nothing of the sort. The opinions are wholly reconcilable and the Petition should not be allowed.

B. The requirement that an emergency situation exist before the Government forgoes a pre-deprivation hearing is rooted not in the Arizona statutes but in long standing constitutional case law.

Petitioner claims that the Court of Appeals relied on the violation of an Arizona statute to find a federal due process right. Petition at page 9. Specifically, Petitioners have alleged that the Court of Appeals' Opinion allows "federal due process rights to be enlarged or circumscribed by the vagaries of individual state legislatures". *Id.* This is simply not a correct assessment of the opinion below.

The notion that traditional procedural requirements of due process can be abated in emergency situations has

long been recognized by this Court. This Court has recognized that "it is fundamental that *except in emergency situations* . . . due process requires that when a State seeks to terminate an interest such as that here involved, it must afford 'notice and opportunity for hearing appropriate to the nature of the case' *before* the termination becomes affected". *Bell v. Burson*, 402 U.S. 535, 542 (1971) (emphasis added).

This rule of due process has been reiterated by this and other Courts. *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 300 (1981) ("[S]ummary administrative action may be justified in emergency situations."); *Parratt v. Taylor*, 451 U.S. 527, 541-43 (1981); *Patterson v. Coughlin*, 761 F.2d 886, 892 (2nd Cir. 1985); *Harden v. Adams*, 760 F.2d 1158, 1167 (11th Cir. 1985); *Miranda v. Southern Pacific Transportation Company*, 710 F.2d 516, 522 (9th Cir. 1983).

The opinion below recognized that this doctrine is rooted not in Arizona statutes but in constitutional law in the citation of *Stretten v. Wadsworth Veterans Hospital*, 537 F.2d 361, 369 & n.20 (9th Cir. 1976). *Chalkboard, Inc. v. Brandt*, 902 F.2d 1375, 1381 & n.6 (9th Cir. 1990)

Petitioner's argument that the opinion below conflicts with other circuits is also incorrect. The cases cited in the Petition at pages 11-12 stand for the proposition that a violation of state statute or regulation does not deny an official from claiming qualified immunity. As previously noted, nothing in the opinion below conflicts with this rule of law.

One case cited by Petitioner is closely analogous to the case at bar. In *Robison v. Via*, 821 F.2d 913 (2d Cir.

1987), the Court addressed the question of when due process permitted children to be removed from their parents without a pre-deprivation hearing. The Court of Appeals stated that it was "well established that officials may temporarily deprive a parent of custody in 'emergency' circumstances without parental consent or a *prior* court order' ". 821 F.2d at 921. See also *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 848 (1977); *Doe v. Staples*, 706 F.2d 985 (6th Cir. 1983).

In conclusion, the due process right to notice and opportunity to be heard before losing your livelihood absent an emergency does not arise as a result of an Arizona statute but rather as a result of long standing constitutional law. The Arizona statutes were only evidence that, according to the Arizona legislature, even in emergency situations, some procedural safeguards would not be unduly burdensome.

II. THE NINTH CIRCUIT CORRECTLY APPLIED THE *MATHEWS v. ELDRIDGE* BALANCING TEST IN CONCLUDING THAT SOME SORT OF PRE-TERMINATION HEARING WAS REQUIRED ABSENT AN EMERGENCY.

Petitioners' second argument is that the Ninth Circuit concluded that due process required a pre-termination hearing prior to an emergency license suspension. This is simply inaccurate. The Ninth Circuit held that no such pre-termination hearing would be required in the case of an emergency. The Ninth Circuit did, however, rule that a question of fact existed as to the existence of an emergency in this case.

Therein lies the heart of Petitioners' argument. Petitioners maintain that the category of children's welfare itself should, in all cases, constitute an emergency. 902 F.2d at 1381. Petitioners maintain that if an administrator has unreasonably concluded that there is an emergency, the failure to provide notice and opportunity to be heard before a person's livelihood is destroyed should nonetheless be proper.

The Court of Appeals noted

> "the defendant contended that the summary suspension did not violate procedural due process because swift action was needed to protect the welfare of children. The state's interest in protecting children is undeniably great. Chalkboard strongly disputes, however, the existence of an emergency, and the facts are sufficiently in dispute to preclude resolution of that issue on summary judgment." 902 F.2d at 1381 (footnote omitted).

The District Court previously denied Petitioners' motion for summary judgment on the grounds of qualified immunity because "the issue of whether an emergency existed was a material issue of fact to be tried". Petition at pages 5-6.

This holding is consistent with long established constitutional decisions. In *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264, 299-300 (1981) this Court recognized

> "Our cases have indicated that due process ordinarily requires an opportunity for 'some kind of hearing' prior to the deprivation of a significant property interest . . . The Court has often

> acknowledged, however, that summary administrative action may be justified in emergency situations." (Citations omitted)

See *Parratt v. Taylor*, 451 U.S. 527, 540 (1981); *Fuentes v. Shevin*, 407 U.S. 67, 91 (1972).

Balancing the interest as required by *Mathews v. Eldridge*, 424 U.S. 319 (1975) mandates this conclusion. The interest of the Respondents is obviously significant. Karen Hoyt, as the owner and shareholder of a corporation licensed by the State, clearly had a protected property interest. The fact that Respondents' business assumed a corporate form does not deprive Respondent of the right to due process. *Metropolitan Life Insurance Company v. Ward*, 470 U.S. 869, 881 n.9 (1985). Petitioners argue that the fact that the owner may have depended on the license for her livelihood is irrelevant and that the State should not distinguish between a business that is owned by an individual and a well financed corporation. Petition at page 14.

Petitioner fails to correctly perceive the situation. The license for the Chalkboard day-care center provided a livelihood not only for the owner of the Chalkboard but for its employees as well. The school provided employment for Karen Hoyt and for its employees. The school was also an enormous investment of time and money for Karen Hoyt who assumed the risk of an entrepreneur. As the Court of Appeals correctly pointed out, Respondent's license in this case was issued and was essential to her

pursuit of a livelihood. 902 F.2d at 1381 citing *Bell v. Burson*, 402 U.S. 535, 539 (1971).[2]

The second prong of the *Mathews* test also weighs heavily in Respondent's favor. The risk of erroneous deprivation is extremely high here. By its very nature, allegations of abuse made by toddlers are suspect. A touching on the buttock can be the simple act of pushing a child on a swing. The communication skills of preschool children are not highly developed. In addition, suggestive or ambiguous questions by zealous investigators may lead to inaccurate statements by children. A toddler's ability to accurately perceive or remember may also be suspect. In the event that the deprivation turns out to have been erroneous, the harm is irreparable. As the Ninth Circuit correctly pointed out, the failure to give Respondents notice of the allegations against them and a chance to respond made the risk of error "considerable".

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[2] Petitioner argues that day-care centers are somehow to be treated separately from other businesses because they are "pervasively regulated". *Heckler v. Day*, 467 U.S. 104 (1984) does not support Petitioners' position in this case. In *Heckler*, the lower court had imposed a time limit within which the administrative agency would be required to decided motions for reconsideration for governmental disability claims. In reversing the lower court, this Court recognized that the congressional scheme refused to impose such a deadline and found that because of the "unmistakable intention of Congress, it would be an unwarranted judicial intrusion into this pervasively regulated area for federal courts to issue injunctions imposing deadlines . . . ". 467 U.S. at 119. In the instant case, Petitioners violated an Arizona statute requiring some minimal procedural protection be afforded to Respondents before the closure was made.

902 F.2d at 1381; *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 543 & n.8 (1985).

Petitioners state as a fact that if a summary suspension had been judged erroneous eight days after the order had been issued, the state contract would have been reinstated and the majority of Chalkboard pupils would have been replaced there. Petitioners also claim that this would have largely reduced the financial loss to Respondents. No support exists for this claim in the record. In fact, in the Petition for Rehearing filed in the Ninth Circuit, Petitioners argued that it was "reasonable to assume" that the children would be placed back into the Center. Such an assumption is hardly reasonable.

The undisputed facts indicate the contrary. According to Karen Hoyt and an independent expert in the field of day-care, once these allegations of child abuse were publicized, the school closed and children sent away, the damage to the school was irreparable. Common sense requires this same conclusion. When child abuse allegations are publicized and a school shut down, the damage to the school can never be undone. This holds true regardless of whether the school is a well financed corporation or a sole proprietorship.

The final prong of the *Mathews* test is the burden placed on the State. The District Court and the Court of Appeals recognized that the Arizona legislature provided an expeditious procedure wherein the Petitioner could obtain quick injunctive relief to shut down a school when there was even a "possibility" of serious danger. A.R.S. § 36-886.01. However, the District Court and the Court of Appeals went beyond the provisions set forth in the

statute and held that if an emergency existed, due process would allow that State to forego all pre-deprivation procedures.

Petitioners want the mere allegation of danger to children to be sufficient to justify destroying a business without any sort of notice and opportunity to be heard. Respondents have never argued for a full evidentiary hearing prior to the closure. However, in the instant case, Respondent was not advised of the allegation of physical abuse until she was served with the summary closure order. As for the allegation of sexual molestation, Respondent immediately suspended the accused employee. Petitioners began drafting the summary closure five days before it was issued. The accused had been removed from the campus. No emergency existed. Obviously, in this case, Petitioners must argue that the mere category of threat to children is sufficient to destroy a business without a pre-deprivation hearing as no exigency existed to justify dispensing with traditional due process procedural protection.

Petitioners' reliance on the opinions in *Ewing v. Mytinger & Casselbery*, 339 U.S. 594 (1950); *Fahey v. Malonee*, 332 U.S. 245 (1947); and *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) is misplaced. Each of these cases is consistent with the opinion below. In construing the opinions of *Ewing*, *Fahey* and *North American Cold Storage*, this Court has stated that these were instances where "there has been a special need for very prompt action". *Fuentes v. Shevin*, 407 U.S. 67 (1972). This Court has recognized the *Ewing* and *North American Cold Storage* opinions as "the type of emergency situation in which this Court has found summary administrative

action justified". *Hodel v. Virginia Surface Mining & Reclamation Association, supra,* 452 U.S. at 301.

However, in situations pertaining to an individual's livelihood, this Court has held:

> "We have described 'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest . . . This principal requires 'some kind of a hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment." *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 542 (1985). (Citations omitted)

While there may be exceptions in true emergency situations, *Cleveland Board of Education v. Loudermill,* supra, 470 at 544-545, the simple allegation of an urgent need does not eradicate all meaningful due process protection.

Petitioners also state that the Court of Appeals ignored this Court's opinion in *Dixon v. Love,* 431 U.S. 105 (1977), *Mackey v. Montrym,* 443 U.S. 1 (1979) and *Barry v. Barchi,* 443 U.S. 55 (1979). The Court of Appeals did not ignore these decisions. 902 F.2d at 1381. In each of those cases, the factual questions to be resolved were susceptible of reasonably precise measurement by external standards. *Id.* The risk of error in those cases was not great. However, in the instant case as the Court below correctly noted, a wide variety of information including witness credibility, veracity, interviewing technique, misinterpretation of children's communication all would have been relevant.

In conclusion, Petitioner's allegation that the Court of Appeals' decision misapplied *Mathews v. Eldridge* is simply incorrect. The Ninth Circuit recognized that in a true emergency situation, even the pre-deprivation procedures required by the Arizona statutes can be dispensed with. Petitioners' argument that whenever there is an allegation of an urgent need, regardless of whether there is any basis for the allegation, a pre-deprivation hearing will always be too burdensome is contrary to law. Due process requires some kind of notice and opportunity to be heard when a serious deprivation of a property interest is about to take place absent some exigency. When a licensee has invested time and capital into a new business, notions of fundamental fairness require nothing less.

III. THE NINTH CIRCUIT'S OPINION THAT PRE-TERMINATION HEARINGS ARE REQUIRED ABSENT AN EMERGENCY IS ENTIRELY CONSISTENT WITH THE LAW AS SET FORTH BY BOTH THE NEBRASKA SUPREME COURT AND THE DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO.

In *Dieter v. State Department of Social Services*, 228 Neb. 368, 422 NW 2d 560 (1988), the director of the Department of Social Services, revoked a license of a day-care center and set a post-deprivation hearing. The closure was done pursuant to a statute which expressly authorized the director to revoke the license of a day-care center when "an emergency exists requiring immediate action to protect the physical well-being and safety of a child in an early childhood program . . . ". Neb. Rev. Stat. §71-1915(3) cited at 422 NW 2d at 563. The Nebraska

legislature expressly provided the director authority to take this action.

The center alleged "that the director could not have determined that an emergency existed . . . ". 422 NW 2d at 565. After conducting a de novo review of the evidence, the Nebraska Supreme Court concluded that there "was a sufficient basis to support the director's emergency order under §71-1915(3)". 422 NW 2d at 565. This holding is entirely consistent with the Ninth Circuit's holding that in the event of an emergency, due process would not require notice and opportunity to be heard prior to the closure of Respondent's business.

In *Rice v. Vigil*, 642 F.Supp. 212 (D.N.M. 1986), the District Court held that under New Mexico law, the day-care center had no protected property interest in her day-care license. In *Rice*, the plaintiff conceded that all of her contracts "were terminable at will". 642 F.Supp. at 215. The District Court concluded that the Plaintiff did not therefore have a "legitimate claim of entitlement" to continuing to supply day-care services, and that she had no protected property interest in her license. 642 F.Supp. at 215. The language quoted in the Petition is dicta stating that there would be no due process violation under the facts of that case "even if a legitimate property interest had existed". The Tenth Circuit affirmed the decision of the District Court without rendering an opinion. 854 F.2d 1323 (10th Cir. 1989).

Other than the possible dicta of a District Court in New Mexico, the courts throughout the country are entirely consistent in holding that before a significant

property interest can be destroyed, there must be some sort of a pre-deprivation hearing.

This rule of due process has frequently been reiterated by the Courts. *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 300, 101 S.Ct. 2389 (1981) ("Summary administrative action may be justified."); *Gun South, Inc. v. Brady*, 877 F.2d 858, 867 (11th Cir. 1989); *Harden v. Adams*, 760 F.2d 1158, 1167 (11th Cir. 1985); *Miranda v. Southern Pacific Transportation Company*, 710 F.2d 516, 522 (9th Cir., 1983). In *Patterson v. Coughlin*, 761 F.2d 886, 892 (2nd Cir. 1985), the Court noted that "absent some exigency that requires summary action by the state or circumstances that render a pre-deprivation hearing impossible as a practical matter, the opportunity to be heard *before* the state deprives an individual of life, liberty or property is still the 'root requirement' of the due process clause." The *Patterson* court quoted from *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985). The *Loudermill* court stressed in no uncertain terms the due process requirement of pre-deprivation hearings.

The interests of children must be protected. However, the fact that the interests of children are involved does not justify dispensing with long cherished principals of due process. *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 848 (1977); *Doe v. Staples*, 706 F.2d 985 (6th Cir. 1983); *Penaranda v. Cato*, 1990 W.L. 90386, ___ F.Supp. ___ (S.D. Ga. 1990), (Revocation of a day-care center license does not require stringent application of procedural due process requirements in an emergency situation.) See also *Roe v. Conn*, 417 F.Supp. 769, 778 (M.D. Ala. 1976).

Petitioners argue that it makes no difference if the allegation of abuse at the center concerned incidents ongoing at the time of the summary suspension or if they occurred months or even years earlier. The urgency of the situation apparently has no bearing on the strength of the government's interest according to Petitioners. No support exists for Petitioners' claim that absent an emergency, it was lawful to close the Respondent's business without some sort of pre-deprivation hearing. Petitioners' argument that this Court should now adopt this standard is a request for a radical change in longstanding constitutional law, and it should be rejected.

IV. PETITIONERS' ARGUMENT THAT A BUSINESS SUMMARILY CLOSED WITHOUT SOME KIND OF HEARING BECAUSE OF A CLAIMED EMERGENCY SHOULD NEVER BE SUBJECT TO REVIEW IS CONTRARY TO THE DECISIONS OF THIS COURT.

In this argument, the Petitioners recognize that the opinion below permits a summary closure in the event of an emergency. However, Petitioners argue that this holding is improper because whether there is probable cause to believe that an emergency exists should not be subject to either a pre-termination hearing or a subsequent judicial review. Petition at page 22. Petitioners' suggestion is frightening. The notion that an administrative official can decide that there is an emergency and close down a business and never be subjected to a review of the reasonableness of the decision is repugnant to our system of justice. It conflicts with the holdings of this Court and other federal courts throughout the land.

In *Anderson v. Creighton*, 483 U.S. 635 (1987), this Court considered the issue of qualified immunity in a civil rights action based on an alleged unlawful search and seizure. In that case, the District Court granted summary judgment for Anderson on the grounds of qualified immunity holding that the undisputed facts established probable cause and that exigent circumstances justified his failure to obtain a warrant. The Court of Appeals reversed the ruling. In its review as to the issue of probable cause and exigent circumstances, this Court reviewed the facts to determine whether reasonable officers could have believed that their conduct was lawful. This Court held that the "determination whether it was objectively legally reasonable to conclude that a given search was supported by probable cause or exigent circumstances will often require examination of the information possessed by the searching officials". 438 U.S. at 641. In *Anderson*, the specific question to be answered was "whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed." 483 U.S. at 641.

In *Graham v. Connor*, ___ U.S. ___, ___ S.Ct. ___, 104 L.Ed.2d 443 (1989), this Court considered a §1983 claim alleging excessive use of force. This Court recognized that "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them . . . ". 104 L.Ed.2d at 456. In addition, this Court recognized that "in assessing the credibility of an officer's account of the circumstances that prompted the use of force, a fact-finder may consider, along with other factors, evidence that the officer

may have harbored ill-will toward the citizen." 104 L.Ed.2d at 457 & n.12. *Anderson* and *Graham* make clear that the reasonableness of the official's action is judged based on all the facts and circumstances known to the official. The standard is not one of the subjective good faith of the official, but rather the objective reasonableness of his or her action. 483 U.S. at 641.

Courts have correctly applied this test in cases similar to the case at bar. In *Robison v. Via*, 821 F.2d 913 (2d Cir. 1987), cited by the Petitioner, the §1983 complaint alleged that the defendant deprived Robison custody of her two children in violation of her due process rights. The complaint arose out of an allegation that Robison's young daughter had been sexually abused by Robison's husband. The Court recognized that it was "well established that officials may temporarily deprive a parent of custody in 'emergency' circumstances 'without parental consent or a *prior* court order'." 821 F.2d at 921. The *Robison* court concluded "that the record established the qualified immunity of *Via* and *Harrison* because it was objectively reasonable for them to believe they violated no federal rights when they seized the children." 821 F.2d at 921. In reviewing the record, the *Robison* court concluded that there was ample evidence to establish an "objectively reasonable" basis for the defendants to believe that an emergency existed. 821 F.2d at 922. See further discussion *infra* at pages 27-29.

The scope of review for the existence of exigent circumstances and the scope of review for the existence of probable cause in the context of qualified immunity is the same. Are the facts such that a reasonable officer could

reasonably have believe that his or her actions were lawful, *i.e.*, that he or she had probable cause or that exigent circumstances did exist? *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986); *Bigford v. Taylor*, 896 F.2d 972, 975 (5th Cir. 1990); *Bennett v. City of Grand Prairie, Texas*, 883 F.2d 400, 408-09 (5th Cir. 1989); *Henry v. Perry*, 866 F.2d 657, 659 (3rd Cir. 1989); *Calamia v. City of New York*, 879 F.2d 1025 (2nd Cir. 1989); *Walsh v. Franco*, 849 F.2d 66, 69-70 (2nd Cir. 1988); *Clark v. Evans*, 840 F.2d 876, 881-882 (11th Cir. 1988).

The notion that an official's determination of an emergency is not subject to a review in terms of its reasonableness has never been adopted by any court. A suggestion that an official's determination of exigent circumstances should occur with impunity is all the more disturbing in a case such as this where there are subjective determinations to be made, including evaluations of the perceptions and memories of small children, evaluations of the interrogation techniques used with toddlers, problems inherent in communicating with toddlers and the vast discretion that the administrative official has in determining the proper action, if any, to be taken against a center.

Cases cited by Petitioners, taken in context, do not support their claim. Petitioners' quote from this Court's opinion in *Skinner v. Railway Labor Executives Association*, ___ U.S. ___, 109 S.Ct. 1402, 1419 n.9 (1989) is misleading. The quote claims that this Court disapproved of *post hoc* evaluations because a court can always imagine alternative means by which objectives of the government may be

accomplished. However, this footnote pertained to a challenge to an administrative regulation promulgated pursuant to the Federal Railway Safety Act of 1970. The respondent in *Skinner* argued that there were less drastic means to detect employees impaired by drugs without the blood and urine tests required by the regulation. This Court refused to second guess legislation drafted by the agency.

The Petitioner's reliance on *Mackey v. Montrym*, 443 U.S. 1 (1979) is also misplaced. *Mackey* dealt with a suspension of a driver's license based on a refusal to take a blood alcohol test. As this Court noted in its decision

> "[a]s was the case in *Love*, the predicates for a driver's suspension under the Massachusetts scheme are objective facts either within the personal knowledge of an impartial government official or readily ascertainable by him".

Petitioner cites *Turner v. Safley*, 482 U.S. 78, 89 (1987), *Black v. Romano*, 471 U.S. 606 (1985); and *Baker v. McCollan*, 443 U.S. 137 (1979) for the proposition that the Court should not be allowed to second-guess an administrative judgment as to the existence of an emergency. Respondents do not seek a reviewing Court to second-guess an administrator, or to substitute its judgment for that of the administrator. However, a Court must be permitted to review the facts known to the administrator to determine if there was any reasonable basis for the administrator to conclude that there was an emergency necessitating the closure of a business without any prior opportunity to be heard.

Petitioners make a broad claim that the holding below will nullify this Court's opinion in *Ewing v.*

Mytinger and Casselbery, supra; Fahey v. Williams, supra; North American Cold Storage v. Chicago, supra; Dixon v. Love, supra; Mackey v. Montrym, supra; and *Barry v. Barchi, supra.* In *Ewing,* a federal statute was challenged as being unconstitutional. No issue was raised in that case as to whether the facts were sufficient to allow a determination of probable cause or emergency circumstances. Similarly, in *Fahey v. Malonee,* the challenge was made to the constitutionality of a statute. No claim was ever litigated as to the factual basis for the administrator's conduct. In *North American Cold Storage Company v. Chicago,* a municipal ordinance was challenged as unconstitutional. There was no litigation as the factual basis for the City of Chicago's action. Similarly, in *Dixon v. Love, Mackey v. Montrym* and *Barry v. Barchi,* the constitutionality of the procedure itself was challenged not the factual basis for the administrative decision to invoke the procedure. *Montrym* challenged whether the language of the statute was "void on its face as violative of the Due Process Clause . . . " *Mackey v. Montrym,* 443 U.S. at 3. *Love* challenged a statute allowing the summary suspension of a driver's license based on an individual's convictions for traffic offenses. *Dixon v. Love,* 431 U.S. at 107. *Barchi* challenged a statute allowing the summary suspension of a license based on the results of a drug test. In every case, the factual basis for the administration's decisions was never challenged as unreasonable.

Clearly, a review of the facts known to the official to determine if there was an objectively reasonable basis for the belief that this conduct was lawful underlies this Court's holdings regarding the standard for qualified immunity from *Harlow v. Fitzsimmons,* 457 U.S 800 (1982)

to the present. Petitioners' argument that the subjective belief of the administrator that an emergency situation existed is not subject to review is unsupported in the law.

V. AT THE TIME OF THE CLOSURE, IT WAS CLEARLY ESTABLISHED THAT ABSENT AN EMERGENCY, SOME SORT OF NOTICE AND OPPORTUNITY TO BE HEARD WAS REQUIRED PRIOR TO THE CLOSURE OF RESPONDENTS' BUSINESS.

The law requiring some sort of pre-deprivation hearing unless an emergency exists is clearly established. The "clearly established" test of qualified immunity does not require that a case identical to the instant one have been decided previously. As this Court has stated

> "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . but it is to say that in the light of the pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). (Citations omitted)

Undoubtedly, novel situations not yet resolved can and must form the basis of a §1983 claim. Cf. *Brower v. County of Inyo*, ___ U.S. ___, 109 S.Ct. 1378 (1989).

The opinion below relied on this Court's opinion in *Cleveland Board of Education v. Loudermill, supra. Loudermill* concerned the termination of a school district employee. In that case, this Court reiterated the long standing doctrine that public employees having a property interest in

continued employment could not be deprived of that right by the state without a pre-deprivation hearing. Although a post-termination hearing was scheduled and the employee could have been reinstated with back pay, this Court held that due process "requires 'some kind of a hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment . . . . As we pointed out last Term, this rule has been settled for some time now." *Cleveland Board of Education v. Loudermill*, 470 U.S. at 542 (citations omitted).

In the instant case, the record before the District Court was undisputed. The closure of a day-care center amidst allegations of sexual molestations would irreparably harm the day-care center and no post deprivation hearing could remedy the damage. The impact of the action in this case was far greater than the action of the *Cleveland Board of Education*. In the instant case, the State's action not only destroyed the livelihood of Karen Hoyt, who invested her time, energies and resources into the business, but also destroyed the livelihood of every employee working at the center.

In situations where a parent is alleged to be abusing a child, a far greater risk to the child exists than that posed in the instant case. Unlike a situation in a day-care center where, as here, an employee accused of wrongdoing can be suspended and kept away from children during an investigation, no such action can be taken with a parent. The threatening parent has access to the child twenty-four hours a day. Nevertheless, courts have long recognized that in situations where it is alleged that a parent is a threat to a child, a temporary removal of the child from the home without a hearing or court order is justified

only when there is an emergency. *Robison v. Via*, 821 F.2d 913 (2nd Cir. 1987). Although the *Robison* case was decided after the Petitioners' closure of the Respondents' business, prior cases also reached this same conclusion. See *Lossman v. Pekarske*, 707 F.2d 288 (7th Cir. 1983); *Duchesne v. Sugarman*, 566 F.2d 817, 825-26 (2nd Cir. 1977) The same holding has been applied to foster parents. See *Smith v. Organization of Foster Families for Equality & Reform, supra*. Similar conclusions have been reached in licensing situations including day-care centers. *Bell v. Burson, supra,* (driver's license); *Penaranda v. Cato, supra.* (day-care license).

The decision of the Ninth Circuit that a pre-deprivation hearing was necessary absent an emergency before the Petitioner could close the Center is entirely consistent with this case law. Immediately upon learning of the allegation of sexual abuse, Karen Hoyt suspended the accused teacher. In public employment situations where keeping an employee is a significant hazard, this Court has suggested this very procedure. *Cleveland Board of Education v. Loudermill*, 470 U.S. at 544-545. Moreover, all of the investigators for the State knew that the suspected employee had been suspended when their investigation began.

Clearly, the interests of children must be protected. In an emergency situation, there can be no hesitation to remove children from a threatening scene. However, when there is no reasonable basis for a claimed emergency, the balancing of interests inevitably leads to the conclusion that some sort of hearing must be granted before a business can be destroyed.

No case law supports Petitioners. Petitioners claim that *Dieter v. State Department of Social Services, supra* and *Rice v. Vigil, supra,* are "prior reported decisions" that demonstrate no clearly established right. On the contrary, both of these cases were decided years after the closure in this case and are entirely consistent with the Ninth Circuit's opinion. See previous discussion, *supra* at pages 15 to 18.

Finally, the statutory scheme set forth by the Arizona state legislature specified an expeditious injunctive procedure to be followed when there was even a possibility of danger to children. Petitioner was well aware that he did not have the authority to issue a closure order. To that extent, the Ninth Circuit opinion goes far beyond the powers provided by the Arizona state legislature in allowing an ex parte closure in the event of an emergency despite the fact that the statutory scheme does not so provide.

In conclusion, the due process right of a pre-deprivation hearing where one's livelihood is jeopardized, absent an emergency, is clearly established. Given the large risk of error, the significant private interest involved for Respondents and their employees, and the foregoing case law, Petitioners' due process rights were quite clearly established at the time of the closure.

VI. CONCLUSION

No interest is served by granting the Petition for Writ of Certiorari. The case law is clear that absent an emergency, some sort of notice and opportunity to be heard

should be allowed before there is a deprivation of a significant property interest. The Court of Appeals' opinion did nothing more than affirm the District Court's denial of a Motion for Summary Judgment where the District Court concluded that a factual dispute existed and that qualified immunity could not be granted without resolution of these issues. If the Petitioners had a reasonable basis for their belief that an emergency existed and immediate closure of the center was required without giving Respondents any sort of pre-deprivation hearing, Petitioners will be entitled to qualified immunity. If, on the other hand, there was no objectively reasonable basis for the director's conclusion that an emergency existed and to close down the Respondent's business without even first advising her of the allegations against her, Petitioners should not have the benefit of qualified immunity.

Petitioners' suggestion that in all instances where the interest of children are alleged, day-care center licenses may be suspended without some sort of pre-deprivation hearing is wholly unsupported in the law and contrary to long cherished principles of due process. For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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